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PROCEDURE BEFORE THE FEDERAL TRADE COMMISSION.

The Federal Trade Commission was created by the act of Congress,¹ approved September 26, 1914. By that act certain powers and duties were confided to it; additional duties were conferred by the Supplemental Anti-Trust Act.² Its powers as a whole are divisible into (a) those requiring the exercise of quasi-judicial powers, and (b) of investigation. Undoubtedly the Commission, like the Interstate Commerce Commission, is an administrative board³ exercising quasi-judicial functions.⁴

While the practitioner may be interested in the investigating powers, particularly when preliminary to the exercise of judicial or quasi-judicial functions or as a matter of general information, he is vitally concerned with the exercise of judicial or quasi-judicial powers in what may be termed proceedings. The powers of investigation are broad and comprehensive⁵ and will ultimately be productive of beneficial results. The power and duty to exercise judicial or quasi-judicial functions is given in part by the Federal Trade Commission Act and in part by the Supplemental Anti-Trust Act. Those under the former Act are divisible into two heads: (a) Acting as Master in Chancery at the request of the Attorney General to draft decrees in Anti-Trust suits⁶ and (b) respecting "unfair methods of competition in commerce."⁷ Under the Supplemental Anti-Trust Act the exercise of the judicial power of the Commission may be invoked to (a) prevent discrimination in price,—“local price cutting”⁸—(b) to prevent tying

¹An Act to create a Federal Trade Commission, to define its powers and duties and for other purposes, approved September 26, 1914. 38 Stat. 717.

²An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes, approved October 15, 1914. 38 Stat. 730.

³*Cincinnati, N. O. & T. P. Ry. v. Int. Com. Comm.* (1896) 162 U. S. 184; *Int. Com. Comm. v. Cincinnati, N. O. & T. P. Ry.* (1897) 167 U. S. 479.

⁴*Int. Com. Comm. v. Cincinnati, N. O. & T. P. Ry.* (C. C., S. D. Ohio, W. D. 1896) 76 Fed. 183; *Int. Com. Comm. v. Cincinnati, N. O. & T. P. Ry.* (C. C., S. D. Ohio, W. D. 1894) 64 Fed. 981; *Texas & Pacific Ry. v. Int. Com. Comm.* (1896) 162 U. S. 197; *Int. Com. Comm. v. Cincinnati, N. O. & T. P. Ry.* (1897) 167 U. S. 479; *Int. Com. Comm. v. Louisville & N. Ry.* (C. C., M. D. Tenn. 1896) 73 Fed. 409.

⁵Federal Trade Commission Act, Sec. 6, 38 Stat. 721.

⁶Federal Trade Commission Act, Sec. 7, 38 Stat. 722.

⁷Federal Trade Commission Act, Sec. 5: "The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce." 38 Stat. 719.

⁸Supplemental Anti-Trust Act, Sec. 2, 38 Stat. 730.

contracts⁹ and (c) to prohibit acquisition by one corporation of the capital stock of another except for investment.¹⁰ Under the five heads therefore falls the jurisdiction,—the power to hear and determine,¹¹ of the Commission.

In compliance with the power granted in Section 6 of the Federal Trade Commission Act,¹² the Commission promulgated in June last its Rules of Practice. These follow quite closely the outline as found in the statute (Sec. 5) and in the Supplemental Anti-Trust Act (Sec. 11), particularly with respect to service of complaint, orders, and process. There is one marked difference in the provisions in the two Acts: If the Commission has reason to believe that unfair methods of competition in commerce are or have been used and it shall appear to the Commission that a proceeding by it would be to the interest of the public it shall proceed.¹³ Respecting price cutting, tying contracts and unlawful acquisition of stock the statute is mandatory; the Commission is not called upon to determine whether a proceeding would be to the interest of the public; the language is "whenever the Commission . . . shall have reason to believe that any person is violating or has violated the provisions [price cutting, tying contracts, unlawful acquisition of stock] it shall" proceed. The reason for this difference is not manifest; a consideration thereof must lead into the realm of pure speculation. Certain it is, the Rules of Practice draw no line of distinction between the two classes of cases, for the rule¹⁴ deals with cases where "there is a violation of law over which the Commission has jurisdiction."

To invoke the power in respect to drafting decrees the Attorney General must request it.¹⁵ To start a proceeding against one for using unfair methods of competition in commerce, for discriminating unlawfully in price, for making tying contracts or for

⁹Supplemental Anti-Trust Act, Sec. 3, 38 Stat. 731.

¹⁰Supplemental Anti-Trust Act, Sec. 7, 38 Stat. 731.

¹¹When referring to an administrative body the word "jurisdiction" must be taken very broadly. "The power to hear and determine a cause is jurisdiction; it is *coram judice*, whenever a case is presented which brings this power into action." *United States v. Arredondo* (1832) 31 U. S. 691, 709.

¹²Federal Trade Commission Act, Sec. 6 (c): "The commission shall also have power to make rules and regulations for the purpose of carrying out the provisions of this act." 38 Stat. 721.

¹³Federal Trade Commission Act, Sec. 5, 38 Stat. 719.

¹⁴Rule II.

¹⁵Federal Trade Commission Act, Sec. 7, 38 Stat. 722.

unlawful acquisition of stock, it is necessary to "apply to the Commission to institute a proceeding in respect to any violation of law over which the Commission has jurisdiction."¹⁶ Applications are to be in writing and to contain "a short and simple statement of the facts constituting the alleged violation of law",¹⁷ with the name and address of the applicant and the party complained of.

On receipt of the application the Commission shall investigate the matters complained of in the application. There is no provision for the notification of the party complained of that there has been any allegation or charge against him; he knows not that he is the subject of a complaint, and consequently has no knowledge of the particular offense of which he is charged. He is totally in the dark. Not so the examiner of the Commission; he knows the charges, and with his broad powers,¹⁸ if there is "pay dirt" at all, will very likely find it.

Whether an application must be made by one injured or by an informer is not stated either in the acts or in the Rules of Practice. Probably one having sufficient knowledge of a situation to make "a short and simple statement of facts constituting an alleged violation of law" could make an application within the rule.

If the Commission by its *ex parte* investigation does not find that there is or has been a violation of law of which it has jurisdiction or that it will not be to the public interest to file and serve a complaint, it would appear that he who complained is remediless. Being nominally a part of the executive department, the Commission would undoubtedly be subject to appropriate writs from the Supreme Court of the District of Columbia¹⁹ to compel filing and serving a complaint should it improperly refuse to do so.

If the *ex parte* investigation by the Commission discloses to the Commission "that there is a violation of law over which the Commission has jurisdiction" it will "issue and serve" upon the

¹⁶Rule II.

¹⁷Rule II.

¹⁸Federal Trade Commission Act, Sec. 9: "That for the purposes of this act the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against." 38 Stat. 722.

¹⁹Int. Com. Comm. v. United States *ex rel.* Humboldt S. S. Co. (1912) 224 U. S. 474.

party²⁰ complained of a complaint stating its charges. Whether the Commission when it comes to proceed against one by its complaint will confine itself within the limits of the original complaint made to it or extend the scope does not appear. One might, for example, be complained of, in that he is using "unfair methods of competition in commerce". This charge might or might not be found upon investigation *ex parte* to be well founded. The same investigation might disclose violations of other provisions. Whether these last mentioned matters will be included in the Commission's draft of the complaint is not known; probably they would be.

The procedure thus far is analogous to proceedings on its own motion by the Interstate Commerce Commission, provided for in Section 13 of the Act to regulate commerce.²¹ There is this important difference, however; there is not necessarily a stated complaint and no charge in such proceedings; there is simply an order for an inquiry and investigation into the particular matter. Before the Federal Trade Commission, there is a kind of information or presentment containing charges, presumably in detail; who is really the complainant before the Federal Trade Commission seems to admit of some doubt. The complaint is by the Commission, stating "*its*" charges, but Rule X provides for the filing of briefs and "service thereof shall be made upon the adverse parties". Provision is made in the Rules (Rule V) for intervening; manifestly, there might be intervention on behalf of the respondent or against him.

The criticism of the Interstate Commerce Commission so frequently made at one period of its history seems to be applicable with great force to the Federal Trade Commission. It was often charged against the former that it was both prosecutor and judge; at one time (prior to 1906) and in one class of proceedings (on its own motion) it may have been so. At present the great majority of cases have a plaintiff and a defendant, and the Com-

²⁰The method of service is provided for in the Federal Trade Commission Act, Sec. 5, 38 Stat. 719; in the Supplemental Anti-Trust Act, Sec. 11, 38 Stat. 734; and Rule IV of the Rules of Practice. Service may be personal, by leaving a copy at the principal office, or by registered mail.

²¹" . . . the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act." 36 Stat. 551

mission acts as judge. Before the Federal Trade Commission the defendant's case would appear to be prejudged when the body files and serves its complaint; there has been a preliminary investigation, *ex parte*, followed by a complaint issued and triable by the investigating body.

The person against whom the Commission serves its complaint is called the "defendant" in the provision respecting the filing of an answer. This document must be filed within 30 days after service of the complaint and must contain "a short and simple statement of the facts which constitute the grounds of defense". Specific admissions, denials or explanations of each fact alleged in the complaint must be pleaded and if the defendant is without knowledge he must so say and such plea to a fact operates as a denial.²² The analogy of this style of pleading to code pleading is clear. In answers before the Interstate Commerce Commission, carriers not infrequently content themselves with a statement which ignores mention of the facts pleaded by the petitioner and "denies that its rates and charges (or rules, regulations and practices) are unreasonable and unjust or unduly discriminatory or otherwise in violation of law"; such form of answer does not admit the facts pleaded by the petitioner;²³ they are the subject of evidence at the hearing.

The Rules of Practice of the Federal Trade Commission do not provide concerning relevant, competent or material evidence.²⁴ Ordinarily witnesses will be examined orally and the testimony reduced to writing. Depositions may be taken upon application in the discretion of the Commission. The application must state the reasons why the deposition is to be taken, time, place and before whom and "the subject matter or matters concerning which the witness is expected to testify". The application, if granted,

²²Rule III.

²³The Rules of the Interstate Commerce Commission provide for a Motion to Dismiss. Rule V reads: "A respondent who deems the petition insufficient to show a breach of legal duty may, instead of answering or formally demurring, serve on the petitioner notice of hearing on the petition; and in such case the facts stated in the petition will be admitted. A copy of the notice must at the same time be filed with the secretary of the Commission. The filing of an answer, however, will not be deemed an admission of the sufficiency of the petition, but a motion to dismiss for insufficiency may be made at the hearing."

²⁴Probably none of the technical rules of evidence will apply. Perhaps the common law rules of evidence should prevail, as such rules were in the absence of statutes prescribed by the Supreme Court of the United States for the guidance of the Court of Claims. *Moore v. United States* (1875) 91 U. S. 270.

seems to be in the usual form but "the person before whom the deposition is to be taken, so specified in the Commission's order, may or may not be as those specified" in the application.²⁵ Six days notice must be given of the taking of a deposition in this country and at least 15 days if abroad. Depositions generally must be taken prior to 10 days before the hearing, 30 days if to be taken in a foreign country. Hearings occur at least 40 days after the service of the complaint. Witnesses are entitled to the same fees as witnesses in the Federal courts.

Briefs,²⁶ unless otherwise ordered, may be filed at the close of the testimony in each contested case but the presiding Commissioner may fix the time of filing. Extension of time for filing must be made at least 5 days before the expiration of the time originally fixed; granting of such application as well as applications for continuances is within the discretion of the Commission.²⁷ Fifteen copies of the brief must be filed with the Secretary of the Commission and proof of service on adverse parties must be submitted. Briefs of more than ten pages must contain a subject index and list of cases. The Rules provide that every brief shall contain: (a) a concise abstract or statement of the case and (b) a "brief of argument exhibiting a clear statement of the points of fact or law to be discussed, with reference to the pages of the record²⁸ and the authorities relied upon in support of each point". Oral argument is a matter of favor and grace, not of right.²⁹

The statutes³⁰ provide that if there appears from the hearing to be a violation of the provisions of the acts the Commission shall make a report in writing in which it shall state its findings as to

²⁵Rule VIII.

²⁶Rule X.

²⁷Rule VI.

²⁸The Rules of Practice do not provide as do the rules of the Interstate Commerce Commission, for supplying the parties *gratis* with one copy of the testimony taken at the hearing.

²⁹Rule X. An interesting situation arises when a proceeding has been heard by an examiner and oral argument is denied. In statutes creating administrative bodies it is expressly or by necessary implication provided for a hearing by the Commission. It may be that it is the right of the parties at some stage of the proceeding to be heard by at least a quorum of the body.

³⁰Federal Trade Commission Act, Sec. 5, 38 Stat. 719; Supplemental Anti-Trust Act, Sec. 11, 38 Stat. 734.

the facts³¹ and issue and serve upon the party charged an order requiring him to cease and desist from such violation, and in the event of the unlawful acquisition of stock to sell and dispose of the same. Power to modify or set aside at any time its order is granted the Commission.

The enforcement of the order of the Commission is exclusive in the Circuit Court of Appeals, which may set aside, modify or affirm the same. Proceedings may be instituted by the Commission or by the party against whom the order runs. Review of the decision of the Circuit Court of Appeals is by writ of *certiorari* to the Supreme Court of the United States.³²

The principal office of the Commission is at Washington, where sessions for making orders and for the transaction of other business are held each business day. Hearings may be held at any place in the United States.³³ Three of the five members of the Commission constitute a quorum.

JOHN B. DAISH.

DENVER, COLO.

³¹The facts if supported by evidence are conclusive upon the court. This statutory enactment substantially states the law as determined by the Supreme Court with respect to the reports and opinions of the Interstate Commerce Commission. *Int. Com. Comm. v. Union Pacific R. R.* (1912) 222 U. S. 541, 547.

³²Federal Trade Commission Act, Sec. 5, 38 Stat. 719 and Supplemental Anti-Trust Act, Sec. 11: "The judgment and decree of the court [Circuit Court of Appeals] shall be final, except that the same is subject to review by the Supreme Court upon *certiorari* as provided in section two hundred and forty of the Judicial Code." 38 Stat. 734.

³³Federal Trade Commission Act, Sec. 3: "The principal office of the Commission shall be in the City of Washington, but it may meet and exercise all its powers at any other place. The Commission may, by one or more of its members, or by such examiners as it may designate prosecute any inquiry necessary to its duties in any part of the United States." 38 Stat. 718.